

Law Offices of

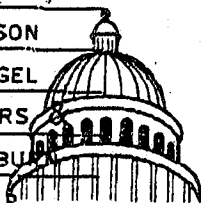
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September 3, 2002

Chairman Karen Getman
Commissioners Swanson, Knox and Downey
Fair Political Practices Commission
P.O. Box 807
Sacramento, CA 95814

Re: **Proposed FPPC Regulation 18225.7**
Proposed FPPC Regulation 18225.8

Dear Chairman Getman and Commissioners:

We write to comment on the proposed repeal and re-adoption of Regulation 18225.7. This firm represents many organizations making independent expenditures. We have extensive experience in counseling clients in this area. We are familiar with the common questions and issues which arise when engaging in independent expenditure activity. With this background, we offer an alternative language for the regulation which is attached to this letter.

In addition, we are writing to offer comments regarding the proposed emergency adoption of Regulation 18225.8. We have significant concerns concerning the breadth of this regulation and the fact that the proposed regulation would appear to repeal much of the Commission's current advice in this area. Moreover, we question whether there is an emergency sufficient to warrant the adoption of the regulation without further opportunity for review and comment by all interested parties.

PROPOSED REGULATION 18225.7

Overall Comments

We do not fundamentally disagree with the staff's conclusion that the current regulation's "multiplication of synonyms . . . defer, without answering, practical questions relating to specific relationships and practices." We also agree that better standards are needed and that these standards should provide "objective criteria."

However, the proposed regulation does not accomplish that objective. In fact, the general scope of the proposed regulation is quite broad. It attempts to define two separate terms: "at the behest" and "coordination." Yet, the narrow

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issue of concern, i.e., independent expenditures, is what should be addressed by the regulation. As drafted, the regulation loses any focus on whether the "coordination" or "behesting" is related to the candidate for whom the expenditure is made on behalf of or for the benefit of. Instead the proposed regulation applies to all situations involving coordination and behesting. This leads to results that suggest if one candidate coordinates or behests a payment, he or she receives a contribution, even if that candidate may not be the beneficiary of the expenditure. The regulation should be confined to interpreting Government Code §85500 (which does not use the term "at the behest") and related situations involving independent expenditures on behalf of candidates. The regulation should provide objective criteria for determining when an expenditure is not independent.

Also, the approach the regulation takes regarding the creation of "rebuttable" presumptions is troublesome. The making of independent expenditures operates in the most protected area of the First Amendment (*Buckley v. Valeo*). A regulation which shifts the burden from the government to the persons engaging in political speech to establish the independent nature of the expenditure is fundamentally flawed.

In any event, the use of "rebuttable" presumptions is not helpful in providing guidance to the regulated community. For those persons desiring to comply with the law, a rebuttable presumption is treated as a conclusive presumption. Accordingly, in our view, it is more helpful if the regulation establishes a series of conclusive presumptions on both sides of the question of whether a particular expenditure is independent and draws those presumptions as narrowly as possible to ensure the maximum protection for political activity.

Finally, the regulation should provide a simple definition of agent based on the common law definition and expressly confined to individuals.

Scope of Regulation

The Political Reform Act defines the term independent expenditure. That definition provides that the expenditure by a person must 1) be a communication, 2) which expressly advocates the election or defeat of a clearly identified candidate and 3) not be made to or at the behest of the *affected candidate*. (Government Code §82031, emphasis added; additional definitions are provided in FPPC Regulation 18225.)

The purported objective of the proposed regulation is to provide guidance to those wanting to make independent expenditures. However, the proposed regulation is not limited to independent expenditures as defined in §82031; in fact, it broadly pulls in any and all expenditures which are "made at the behest" of a candidate.

The starting point for the regulation should be §85500 which does not include the term

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"at the behest" and instead incorporates the current regulatory language in Section 18225.7 which spells out the tests for when an expenditure will not be considered "independent."

In order to provide the needed guidance, the proposed regulation should expand on the circumstances which come within the statutory tests and also those which are clearly outside them.

For example, section (c)(2)(C) defining "coordination with a candidate" suggests that if candidate A discusses or negotiates with a person distributing a communication clearly identifying candidate B regarding the timing of the communication, a contribution has resulted to candidate A, even though candidate B, not A, is the "clearly identified candidate" in the communication. Not only is this result absurd, but the proposed regulation provides no guidance with respect to whether the communication is independent of the candidate benefitting from the expenditure.

The draft regulation we have prepared for your consideration places the emphasis where it belongs, i.e., on whether the expenditure is independent of the candidate "on whose behalf, or for whose benefit" the expenditure was made. It does not attempt to define all circumstances in which a coordinated or behest expenditure is a contribution.

Rebuttable Presumptions

The proposed regulation includes five situations where there will be a rebuttable presumption that an expenditure relating to clearly identified candidates is coordinated with a candidate and therefore an in-kind contribution to the candidate and not an independent expenditure. The regulation does not provide any guidance on how any of the presumptions can be rebutted; it simply shifts the burden of proving that an expenditure was independent to the person making the expenditure and presumably in some measure to the candidate.

As we stated above, this approach is fundamentally flawed since it places the burden of demonstrating that an expenditure was made independently of the candidate on the person making the expenditure. The practical effect of these types of presumptions and the shifting of the burden is that these presumptions are essentially treated as rules by persons who are attempting to comply with the law. For example, under subdivision (d)(2) a person making an independent expenditure relating to a particular candidate will likely not hire a consultant who worked for the candidate in the past six months or one year even if the independent expenditure is not otherwise coordinated with the candidate in any way.

Thus the effect of creating rebuttable presumptions is to draw the line so as to restrict activity which would otherwise be permitted. It is more helpful to persons who may engage in

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independent expenditures and to the public who may be interested to have some lines drawn between activity which is subject to reporting as contributions and potentially subject to limits and activity which is independent and subject to a different type of disclosure and not subject to any limits.

The regulation we have drafted attempts to do this by setting forth in subdivision (c) those circumstances where the expenditure will be treated as a contribution and, in subdivision (d) those circumstances which will not give rise to a determination that an expenditure is not independent.

Definition of Agent

The proposed definition of agent in subdivision (a) is broad, confusing, and includes terms which are not commonly understood in the candidate election context (e.g., any person who serves the candidate or committee in an executive, or policymaking capacity...").

In the past, the Commission has generally relied on the common law definition of agent, e.g., for purposes of determining the date of receipt for contributions (see Regulation 18421.1). For purposes of regulating independent expenditures, we agree that it makes sense to include a definition of agent. But the definition should be based on the common law principles and not on new concepts found nowhere else in the Act or Regulations.

With respect to the definition itself, the language we have proposed is found in Black's Law Dictionary as part of the general definition of "agent."

One other aspect of our proposal is to expressly limit agents to individuals. It appears that this is what was intended by staff's proposal, and it certainly is part of the concept of representation.

PROPOSED EMERGENCY REGULATION 18225.8

Proposed Regulation 18225.8 purports to address the situation where an expenditure is made "at the behest" of a committee which is not controlled by a candidate and therefore becomes a contribution to the behesting committee. It appears therefore to apply to any expenditures made at the request or suggestion, or in coordination with, any general purpose PAC, ballot measure committee, political party committee, major donor or independent expenditure committee regardless of the intent, nature, or type of expenditure. The scope of the regulation appears to be limited only by reference to the exceptions to the definition of "contribution" in Government Code section 82015 and FPPC Regulation 18215. The expenditure in question is not tied in any way to any benefit to the behesting committee.

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This sets a clearly unworkable standard for the application of the reporting statutes and where applicable, contribution limits, to a broad array of possible expenditures. A few examples best illustrate this point.

- PAC A suggests to PAC B that PAC B make a contribution to Candidate C. Has PAC B also made a contribution to PAC A when it makes a contribution to Candidate C?

- Major Donor A asks Major Donor B to make a contribution to Candidate C. Has Major Donor A "received" a contribution from Major Donor B when a contribution is made to Candidate C?

- Consultant to Ballot Measure Committee A coordinates with Consultant to Ballot Measure Committee B (formed for support of the same ballot measure) on the placement of the respective radio ads each Committee is running so that their efforts are not duplicated in any particular area of the state. Have the Committees made reportable contributions to each other?

As noted above, the Commission has issued several advice letters over the years addressing circumstances of coordination and cooperation among committees and advising when those circumstances do or do not result in contribution from one committee to the other. See, e.g., Davis Advice Letter, A-90-173 (pg. 6); Johnson Advice Letter, A-97-537 (pg. 3); Borden Advice Letter, A-97-320; Olson Advice Letter A-90-118. Generally the Commission has advised that the coordination of expenditures in and of itself does not make those expenditures reciprocal contributions between the committees. The adoption of this regulation would lead to many questions regarding the continuing viability of the Commission's advice and, most significantly, the question of whether the Commission is intending to change the rules which have applied in this area.

While one possibility is to limit this regulation by limiting it to expenditures by certain persons, this does not address the situation where there is a request or suggestion but there is otherwise not any direct benefit to the requesting or suggesting committee. The Commission has never advised to our knowledge that persons who may be major donor committees or even general purpose PACs "receive" a contribution if someone made a contribution or expenditure in response to their request or suggestion. Accordingly, the regulation must also be limited to the circumstances where one committee is paying for goods or services provided to another committee or there is otherwise some direct benefit to the "receiving" committee.

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REQUESTS FOR COMMISSION ACTION

In summary, we would request the Commission to consider the following actions:

1. With respect to proposed Regulation 18225.7, to consider adoption of the alternative regulatory language we have provided with this letter. In addition, given the significant differences between what has been proposed by staff and the proposed language we have provided, the Commission may also want to consider giving additional public notice of its proposed action, and thus to postpone final consideration of the regulation to a future meeting.

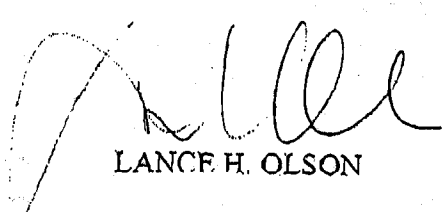
2. With respect to proposed Regulation 18225.8, to reject the finding of emergency for the adoption of this regulation and to schedule consideration of the regulation after regular notice and hearing.

Thank you for your consideration of our comments.

Sincerely,

OLSON, HAGEL & FISHBURN LLP


DIANE M. FISHBURN


LANCE H. OLSON

Attachment: Proposed Regulation 18225.7 (alternative language)
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PROPOSED LANGUAGE FOR SECTION 18225.7

(a) For purposes of section 85500 and any other independent expenditure made on behalf, or for the benefit, of any candidate, such expenditure may not be considered independent and shall be treated as a contribution from the person making the expenditure to the candidate on whose behalf, or for whose benefit the expenditure is made, if the expenditure is made under any of the following circumstances:

(1) The expenditure is made with the cooperation of, or in consultation with, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate.

(2) The expenditure is made in concert with, or at the request or suggestion of, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate.

(3) The expenditure is made under any arrangement, coordination, or direction with respect to the candidate or the candidate's agent and the person making the expenditure.

(b) For purposes of this regulation, an agent of the candidate means any individual who is authorized to act for or in place of the candidate.

c) The following would come within the circumstances described in subdivision (a)(1) - (3) with respect to the candidate on whose behalf, or for whose benefit, the expenditure is made:

(1) The expenditure is made by or through the candidate, or by or through any agent of the candidate in the course of the agent's involvement in the candidate's current campaign.

(2) At the time the expenditure is made, the expenditure is based on information

about the candidate's current election needs or plans, not generally available to the public, provided to the person making the expenditure by the candidate, his or her controlled committee, or agent.

(3) The candidate, his or her controlled committee, or agent has made or participated in making any decision regarding the content, timing, location, mode, intended audience, volume of distribution, or frequency of the independent expenditure.

(4) The candidate, his or her controlled committee, or agent has discussed or negotiated, and made an agreement, with the person making the independent expenditure regarding any of the following: the content, timing, location, mode, intended audience, volume of distribution or frequency of the independent expenditure.

(5) The independent expenditure replicates, reproduces, republishes, or disseminates, in whole or in substantial part, a communication designed, produced, paid for or distributed by the candidate or his or her controlled committee.

(6) The candidate and his or her controlled committee retains the professional services of a person related to election strategy or advocacy, including polling, research, media consulting and advertising planning, and the person making the independent expenditure has retained the services of the same person for the same election.

(d) The following would not come within the circumstances described in subdivision (a)(1) - (3) with respect to the candidate on whose behalf, or for whose benefit, the expenditure is made:

(1) A person interviews a candidate or candidate's agent regarding the candidate's election and on issues affecting the person making the independent expenditure.

- (2) The person making the independent expenditure has obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate's agent.
- (3) The person making the independent expenditure has invited the candidate to make an appearance before the person's members, employees, officers, or shareholders to discuss the candidate's election.
- (4) The person making the independent expenditure has had contact with the candidate concerning communications sent by the person to its members, employees, shareholders, or families of members, employees, or shareholders of the person for the purpose of supporting the candidate or opposing the candidate's opponent.
- (5) The person making the independent expenditure has made a contribution to the candidate.
- (6) Prior to or after the making of the independent expenditure, the person informs the candidate or the candidate's agent that it intends to make or has made an independent expenditure, provided the person does not provide information to the candidate which is not otherwise generally available to the public regarding the timing, location, mode or frequency of the dissemination or distribution, or intended audience for the expenditure.
- (7) The person making the independent expenditure retains a professional consultant, researcher, fundraiser or pollster who was retained by the candidate in prior elections but is no longer so retained and is otherwise is not acting as the candidate's agent in consulting with or advising the person making the independent expenditure.
- (8) The candidate made an unsolicited request to the person making the independent

expenditure for its support, and there is no participation in discussion or negotiation with the candidate or the candidate's agent regarding the independent expenditure.

(9) Other candidates or elected officials of the same political party as the candidate, or agent of a candidate's political party, request the person make an independent expenditure so long as the other candidates or elected officials, or agents of the political party, are not acting as the candidate's agent with respect to the same election.

(10) The candidate, his or her controlled committee, or the candidate's agent have sent unsolicited promotional materials to the person making the independent expenditure.

(11) The person making the independent expenditure has participated, discussed or negotiated with another person or persons who have or intend to make independent expenditures relating to the same candidate regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of their respective independent expenditures.

(12) The person making the independent expenditure meets with a candidate or candidate's agent to discuss issues unrelated to the candidate's election.